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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS Co., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet., 46-47) is reported in 42 F. Supp. 311. The *per curiam* opinion of the Circuit Court of Appeals for the Third Circuit (R. II, 101)¹ is reported in 123 F. (2d) 734.

¹ Pursuant to stipulation of the parties (R. II, 107-114), the printed record for purposes of the petition for certiorari consists of the Appendix to the Board's brief in the Circuit Court of Appeals, referred to herein as "R. I"; and designated portions of the stenographic transcript of testimony and the proceedings in the Circuit Court of Appeals contained in "Vol. 2," referred to herein as "R. II."

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 185-221) are reported in 32 N. L. R. B., No. 103.

JURISDICTION

The order of the District Court (Pet., 47) was entered on December 10, 1941. No appeal was taken from this order. The decree of the Circuit Court of Appeals in a separate proceeding was entered on January 31, 1942 (R. II, 105-107). The petition for writs of certiorari was filed on April 30, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. (a) Whether a United States district court had jurisdiction, during the vacation of the courts of appeals, to entertain a petition for review filed by petitioner under Section 10 (f) of the National Labor Relations Act.

(b) Whether this Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended, to issue a writ of certiorari to the district court to review its order dismissing the petition for review.

2. Whether the circuit court of appeals erred in refusing to stay a proceeding for enforcement instituted by the Board, pending the determination of petitioner's review proceeding in the district court.

3. Whether the circuit court of appeals erred in denying petitioner's application for rehearing.

4. A question urged by petitioner but which we think is not properly presented because not urged before the Board or the circuit court of appeals is whether the Board may direct an offer of reinstatement without finding that the men ordered reinstated have not obtained equivalent employment elsewhere and without directing that they first attempt to secure equivalent employment elsewhere.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the petition, pp. 48-50.

STATEMENT

After the usual Board proceedings, the Board, on June 10, 1941, issued its findings of fact, conclusions of law, and order (R. I, 185-221). The Board found and concluded that petitioner had engaged in certain unfair labor practices affecting commerce (R. I, 189-214), and directed that petitioner cease and desist therefrom, offer reinstatement to employees who had participated in a strike caused by petitioner's unfair labor practices, and take certain other affirmative remedial action (R. I, 212-213, 214-215).

On August 14, 1941, petitioner filed in the United States District Court for the Middle District of Pennsylvania a petition to review the Board's order,

asserting that that court had jurisdiction because both the Circuit Court of Appeals for the Third Circuit, in which circuit petitioner resides and transacts business, and the Court of Appeals for the District of Columbia were then in vacation (Pet., 27-31). On September 11, 1941, the Board filed in the district court a motion to dismiss the petition for lack of jurisdiction (Pet., 36-41). On December 10, 1941, the district court handed down an opinion and entered an order granting the motion and dismissing the petition to review (Pet., 46-47). No further proceedings were had in the district court and no appeal was taken from the district court order.

Meanwhile, on October 7, 1941, the Board filed in the United States Circuit Court of Appeals for the Third Circuit a petition to enforce its order against petitioner (R. II, 87-90). Petitioner applied to the circuit court to stay this proceeding pending the determination of the proceeding in the district court (R. II, 91-97); the application for a stay was denied by the circuit court on October 21, 1941 (R. II, 98). On December 17, 1941, the circuit court heard argument on the merits (R. II, 100-101) and on January 2, 1942, handed down a *per curiam* opinion sustaining the Board's order in full (R. II, 101). A petition for rehearing filed by petitioner on January 17, 1942 (R. II, 102-104) was denied by the circuit court on January 31, 1942 (R. II, 105). On the same day, the circuit court entered a decree of enforcement (R. II, 105-107).

ARGUMENT

1. The petition in No. 1199 for a writ of certiorari to the United States District Court for the Middle District of Pennsylvania should be dismissed since this Court lacks jurisdiction to issue its writ to a district court. Section 240 (a) of the Judicial Code, as amended, which petitioner invokes (Pet., 11-12), does not apply to a case in a United States district court but only to a case "in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia * * *." Nor does any other statute of the United States make provision for the issuance of a writ of certiorari to a United States district court.² Cf. Section 238 of the Judicial Code, as amended. An additional reason requiring dismissal is that the petition for a writ is not timely (28 U. S. C. § 350), for it was not filed until more than three months after December 10, 1941, the date of the entry of the order, review of which is sought (*supra*, p. 4), and without any extension of time for filing being granted by a justice of this Court.

Moreover, petitioner's contention that the district court has jurisdiction to entertain review proceedings while the courts of appeals are on vacation, raised in both No. 1199 and No. 1200, is with-

² The writ may be issued to a circuit court of appeals before argument if the case is in that court (sec. 240 (a)), but here no appeal was filed.

out foundation. Although Section 10 (e) of the National Labor Relations Act permits the Board to bring enforcement proceedings in the district courts while the courts of appeals are on vacation, Section 10 (f) contains no such provision and limits aggrieved persons to review in the courts of appeals. There is no constitutional or logical requirement of mutuality, guaranteeing to a respondent and to the Board identical access to the courts during vacations. Cf. *United States v. Bitty*, 208 U. S. 393, 399-400; *United States v. Heinze*, 218 U. S. 532, 545-546. The special procedure open to the Board is obviously created because of the possible need for immediate enforcement of the Act in special circumstances. The same need cannot arise for a respondent who is subject to no penalty for noncompliance with a Board order prior to judicial affirmance. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *California v. Latimer*, 305 U. S. 255, 260.

2. The petition in No. 1200 for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit presents no question worthy of review:

(a) Petitioner's contention (Pet., 2-3, 4-5, 7-8) that the circuit court erred in denying petitioner's application for a stay of the circuit court proceeding pending the outcome of the district court proceeding (*supra*, p. 4) is without merit. The proceeding in the district court was a nullity for, as we

have shown, that court had no jurisdiction over the subject matter (*supra*, pp. 5-6); the circuit court was not required to hold up the legitimate proceeding awaiting the dismissal of the obviously illegitimate one. Moreover, the circuit court did not finally act to enforce the Board's order until the district court had dismissed that proceeding (*supra*, p. 4). In any event, petitioner suffered no prejudice by the denial of the stay, as demonstrated by the ultimate result in both courts.

(b) Petitioner's contention (Pet., 3, 5-6, 8) that the circuit court erred in denying petitioner's application for rehearing in the face of petitioner's citation of *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, which was not earlier available, is without basis. The Board's findings as to interference are amply supported by evidence apart from the bulletins published by petitioner's officers. Furthermore, the Board's decision contains the findings lacking in the *Virginia Electric* case interpreting the published statements in the context of petitioner's other anti-union conduct (see R. I, 195-209). Petitioner makes no effort to show the contrary.³

³ The argument seems to be not that the *Virginia Electric* case necessarily required a different decision in the instant case, but that the court erred in refusing to grant a rehearing to consider its effect. A rehearing is not required merely because this Court renders a decision on a subject after argument in the circuit court of appeals. Nor can it be assumed that the court below failed to examine the *Virginia Electric* opinion before denying petitioner's application for rehearing.

(c) Petitioner's final contention (Pet., 3, 8-9, 14, 24-25) that the Board lacks power to order reinstatement of persons without a finding that they have not obtained other equivalent employment and without a direction that they attempt to secure equivalent employment elsewhere prior to an offer of reinstatement, is not properly before this Court, for the question was never raised before the Board or in the court below.⁴ Moreover, the contention is clearly unsound. Petitioner cites *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177 (Pet., 24-25), but that case expressly affirms, not denies, the Board's power to order reinstatement even if equivalent employment has been obtained.⁵ And the Board certainly need not, in the absence of a statutory requirement, make affirmative findings on points not disputed before it.

⁴ Section 10 (e) of the Act provides: "* * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *"

⁵ Since the *Phelps Dodge* decision, the Board, pursuant to this Court's affirmation of its power, has exercised its discretion concerning the appropriateness of such relief and has held that effectuation of the Act's policies requires that an offer of reinstatement be made in all cases despite the obtainment of equivalent employment. *Matter of Ford Motor Co. and International Union United Automobile Workers of America, Local Union No. 249*, 31 N. L. R. B. No. 170, decided May 21, 1941.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the district court should be dismissed, and that the petition for a writ of certiorari to the circuit court of appeals should be denied.

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